

with the occasion. Likewise, a divorce court should require a degree of probability which is proportionate to the subject matter."

We would therefore with respect suggest the test to be applied is one set out in *Bater v. Bater*,⁽¹⁾ i.e. the learned judge was correct in relying on *Bater v. Bater* though his mistake was in not saying that the statement of claim in substance alleges fraud.

Plaintiff has to prove his claim. The learned judge has gone into the evidence carefully and reached the conclusion that plaintiff has failed to discharge the onus of proof. Plaintiff has every opportunity to protest about excessive interest he paid but has not done so for the last ten years. As the learned judge rightly pointed out that:—

"...He had not breathed a word of dissent or discontent or objection to the defendant or anyone for the whole of ten years that the loan was in operation. The plaintiff had at all relevant times the benefit of counsel to advise him what to do."

It is pertinent to note that the learned judge also made these observations regarding plaintiff's attitude at page 65 of the Appeal Record:—

"...Having entered into the ten thousand dollar loan agreement and been supposedly oppressed and extorted by the defendant during its tenure he had nevertheless willy-nilly entered into another contract with him for \$2,000 loan and we are told other loans also and despite the harsh and bitter experience and treatment he was still undergoing under the ten thousand dollar loan..."

The learned judge found that the plaintiff had failed to prove his claim. We agree with his conclusion. It must be kept in mind that he had the advantage of seeing and hearing the witnesses. We have no reason to interfere with his finding of facts. Accordingly, we would dismiss the appeal with costs. Deposit to respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Malek & Joseph Au; Ariffin & Ooi.*

SYARIKAT SERI PADU SDN. BHD. v. INTAN ENTERPRISES COMPANY

[F.C. (Wan Suleiman Ag. C.J. (Malaya), Syed Othman & Abdul Hamid F.J.J.) September 8 & December 30, 1981]
[Johore Bahru — Federal Court Civil Appeal No. 119 of 1980]

Practice and Procedure — Injunction — To restrain defendant from exploiting timber on land — Agreement with plaintiff to sell all timber and logs from area — Agreement terminated — Failure to pay instalment on time — Alleged variation of agreement.

In this case the appellants had obtained the right to exploit timber over an area in Kelantan. They entered into an agreement with the respondents to sell all timber and logs from the area. The respondents had paid the appellant a total sum of \$420,000 before and on signing the agreement and they also agreed to pay the sum of \$280,000 by twelve postdated cheques payable every month. The respondents also undertook to pay all premiums, royalties, tributes and other fees to the State Government. One of the cheques given by the respondents was dishonoured and the appellants gave notice of termination. They also advised the Forest Department, Kelantan not to accept any payment of premium, royalty, tribute and other fees from any person except the directors of the appellant company. As a result the respondents were not able to work on the forest. The respondents thereupon terminated the agreement with the respondents on

A the alleged ground that the respondents had committed a breach of the agreement. The respondents brought an action against the appellants and obtained an injunction to restrain the appellants from exploiting timber on the land. The appellants applied for the injunction to be removed. The learned trial judge dismissed the application and in his grounds of judgment said, among other things —

B "The defendant (Seri Padu) alleged that there was a breach of the agreement by the plaintiff and accordingly the agreement was terminated. The defendant alleged that the terms of the agreement had been varied by a subsequent oral agreement. The method of payments had been varied and that the plaintiff had failed to comply with the new terms of the agreement as regards payment. Now whether the defendant could terminate the agreement upon new terms, varied by oral agreement, is a serious question to be tried. The validity of the defendant's action to terminate the agreement under Clause 6 of the agreement can be disputed and therefore should be argued in a trial."

C The appellants/defendants appealed.

D **Held:** (1) the learned judge was correct in holding that there was a serious question to be tried in this case. The fact that there was an oral agreement in addition to or varying the written agreement as to method of payment was all the more reason for the matter to go to trial;

(2) there were also other reasons for the case to go to trial, including the desirability of determining the real nature of the \$420,000 paid before and on signing of the agreement and in what way, if at all, it affected the written agreement;

(3) the balance of convenience in this case showed that the injunction should stay. The respondents would suffer irreparable loss if it was lifted. If not for the injunction, the appellants would allow others to exploit timber from the area in which the respondents had an interest, having outlaid vast sums on it.

FEDERAL COURT.

Dato K.C. Koh for the appellant.

Raja Abdul Aziz bin Raja Addruse for the respondent.

Cur. Adv. Vult.

G **Syed Othman F.J.** (delivering the judgment of the Court): This appeal is against the refusal of the High Court at Johor Bahru to remove an injunction issued on June 13, 1979 to restrain the appellant company (Seri Padu) from "felling cutting, extracting, selling or otherwise dealing with or disposing of any timber or logs or trees" (for convenience we shall refer to this expression as "exploiting timber") from approximately 10,210 acres of land within the Dabong Forest Reserve, Ulu Kelantan in respect of which the parties had entered into an agreement dated November 20, 1978 (the 1978 Agreement) and to restrain Seri Padu from entering into an agreement with other persons.

H The appeal is mainly on facts.

I Seri Padu obtained the right to exploit timber over an area of about 30,202 acres within the Forest reserve from the Kelantan State Economic Development Corporation under an agreement dated July 20, 1972. Seri Padu entered into the 1978 Agreement with Zainun, who is described as Zainun binte Md. Taib, trading as Intan Enterprises Company (Intan) to sell all timber and logs from a delineated area, described as A, within the concession.

The relevant parts of the 1978 Agreement on which Seri Padu rely in their application to remove the injunction are clauses 4, 5 and 6 which read as follows:

"4. In consideration of the above premises the purchaser shall pay a lump sum of Ringgit Two Hundred and Eighty Thousand (\$280,000) only by twelve (12) post-dated cheques payable every month commencing on December 18, 1978.

5. Time is of the essence of this Agreement.

6. In the event of failure on the part of the purchaser or his Banker to honour the aforesaid cheques upon presentation on due dates, this Agreement shall become null and void and whatever payments may have been made by the purchaser to the vendor shall be forfeited and the purchaser shall have no right to any claim whatsoever."

The learned trial judge found in effect as follows: Intan had paid Seri Padu \$360,000 before signing the 1978 Agreement, a further sum of \$60,000 upon execution of the Agreement; Intan agreed to pay instalments as shown above; Intan undertook to pay and paid all premiums, royalties, tributes and other fees payable to the State Government; Intan commenced to extract timber and entered into an agreement with Clonlee Enterprises Sdn. Bhd. for sale of timber; Intan also paid Seri Padu in compliance with the agreement monthly instalments totalling \$143,000; in April 1979 Seri Padu advised the Forest Department, Kelantan not to accept any payment of premium, royalty, tribute and other fees from any person except Seri Padu's directors; because of this, Intan could not work on the forest; in May 1979 Seri Padu terminated the 1978 Agreement with Intan on the alleged ground that Intan had committed a breach of the agreement.

Seri Padu in their affidavit seeking the removal of the injunction referred to clause 5 of the 1978 Agreement which says that time was of the essence of the contract and clause 6 which provides for the consequence of any cheques being dishonoured.

In their letter to Intan's solicitors dated January 24, 1979 they informed the solicitors that Intan's cheque for \$97,000 had been returned with the note "Refer to Drawer" and gave notice of dishonour. They also said in the letter that Intan had breached the 1978 Agreement with regard to payments of monthly instalments; they gave notice of termination and informed the solicitors that all payments under the agreement were forfeited and all other payments that were due would have to be paid accordingly by Intan.

The learned trial judge in his grounds of judgment, among other things, said:

"The defendant (Seri Padu) alleged that there was a breach of the agreement by the plaintiff and accordingly the agreement was terminated. The defendant alleged that the terms of the agreement had been varied by a subsequent oral agreement. The method of payments had been varied and that the plaintiff had failed to comply with the new terms of the agreement as regards payment. Now whether the defendant could terminate the agreement upon new terms, varied by oral agreement, is a serious question to be tried. The validity of the defendant's action to terminate the agreement under Clause 6 of the agreement can be disputed and therefore should be argued in a trial."

Intan, in para. 3 of the reply to the defence, too say that clause 5 of the 1978 Agreement ceased to apply to the monthly payments required to be made by Intan under the 1978 Agreement by reason of Seri Padu having agreed to a change in the mode of payments.

We agree with the learned trial judge in his

observations. The fact that there is an oral agreement in addition to or varying the 1978 Agreement as to method of payment is all the more reason for the matter to go to trial. We also see other reasons.

It is shown in affidavit of September 15, 1979 by Mr. Wong Sheng Chan for Intan, that the sum of \$97,436.66 as stated in the cheque was for payment of \$58,333.33 due to Seri Padu from Green Tropical Sdn. Bhd. and \$39,103.33 due from Kwee Lim Trading Agency. The instalment payment required to be made by Intan to Seri Padu for January 1979 was banked in and credited into the account of Messrs. K.C. Koh & Co., solicitors for Seri Padu, on January 16, 1979. From this, it is clear that the allegation in the application for removal of the injunction on the ground that an instalment was not paid in time does not appear to hold water.

Then clause 6 of the 1978 Agreement, which relates to dishonoured cheques, specifically mentions "the aforesaid cheques", i.e. postdated cheques referred to in clause 4 totalling \$280,000. On the face of the clause the indications are that it becomes operative if all cheques are dishonoured. It is therefore a triable issue to determine whether the vendor has the right to enforce this clause if one cheque is dishonoured on presentation but then honoured in good time, as in this case.

It is also a matter for the court after trial to determine the intention of the parties whether the payment totalling \$420,000, before or on execution of the 1978 Agreement, referred to by the learned trial judge, is some form of security for payment, since it has not been shown what these payments are exactly for. Seri Padu in their defence say that the sum was paid to Seri Padu by M/s. Wong & Co., advocate and solicitors who acted for the purchaser and two other purchasers from the same timber concession. One would wonder how there could be a purchase, when as far as one could understand the situation no trees had yet been felled.

Another reason for this case to go to trial is the contention by Seri Padu that their agreement was with Cik Zainun binte Mohd. Taib, trading as Intan Enterprises Company. By this, Seri Padu contend that they have been dealing with a sole proprietorship and not with a partnership. For Intan, it is argued that Cik Zainun has the right to take in partners into her firm. In arguments many authorities have been discussed. For the purpose of the present case we need not refer to them. It is shown by affidavit of Amran bin Abdul Rahman of September 15, 1979 (pp. 80-84 of record) that on November 18, 1978 Cik Zainun submitted her application, Form A Business Registration (p. 86 of record), for registration of her business as proprietor of Intan Enterprises Company. This application was registered on December 20, 1978. On the same day, i.e. November 18, 1978, Form B, Registration of Changes in Business for Intan Enterprises Company, was also filed giving three names as partners, Zainun binte Mohd. Taib, Amran bin Abdul Rahman and Kassim bin Mohamad @ Mamat, but this Form was only registered on August 16, 1979. For Seri Padu, it has been suggested that there might be some impropriety in the registration having taken so long. We can only say that this would be a

matter of speculation. On the evidence and in circumstances of the present case, the fact that Cik Zainun entered into the 1978 Agreement in her name trading as Intan Enterprises Company does not necessarily mean that she was entering into the agreement solely in her own right. There are strong indications that Seri Padu must have been aware that she was establishing a partnership when she entered into the agreement. She is the first Malay lady to our knowledge who would be venturing into a logging business. It would be hard to expect that she would have ventured into this business by herself. In any case, it cannot be disputed that she is a party in the present action. If indeed it can be established that the others have never been involved, an application can always be made during the trial for their names to be struck out as parties.

Above all, from what has transpired, it is desirable in the interest of Seri Padu itself to determine the real nature of the \$420,000 paid before and on signing the agreement, and in what way, if at all, it affects the 1978 Agreement, since the immediate payment stated in the 1978 Agreement for giving a right to exploit timber over a vast area is only \$1.

On these considerations, the balance of convenience clearly shows that the injunction should stay. Intan will suffer irreparable loss if it is lifted. If not for the injunction, Seri Padu will allow others to exploit timber from the area in which Intan has still an interest, having outlaid vast sums.

Appeal is dismissed with costs. Deposit to respondent to account of taxed costs.

Appeal dismissed.

Solicitors: Dato K.C. Koh & Partners; Rithaudeen & Aziz.

LETCHUMI AMMAL v. NAM FONG HOUSING SDN. BHD.

[F.C. (Suffian L.P., Syed Othman & Abdul Hamid F.JJ.)
February 3 & March 3, 1982]

[Kuala Lumpur — Federal Court Civil Appeal
No. 107 of 1980]

Contract — Agreement for consideration to quit and deliver vacant possession of squatter hut by certain date — Squatter hut occupied by tenant who refused to quit — Whether time essence of contract — Action by owner of land against owner of squatter hut — Tenant subsequently compensated by owner of land and vacated hut — Action by owner of hut to claim sum under agreement — Contracts Act, 1950, ss. 41 & 42.

In this case the appellant had built a squatter house on a piece of land and had let it out to a tenant. The owner of the land made an agreement with her whereby it was agreed that the owner would pay her \$600 and she agreed to quit and deliver up possession of the house by April 10, 1974. She had the option either to demolish or deliver up possession of the hut. In either event the owner was to pay her a further sum of \$5,400 by way of compensation. If the appellant failed to demolish or deliver up possession on or before April 10, 1974 she agreed to pay the owner liquidated damages of \$200 per day for the breach. The appellant did not fulfil her part of the bargain and the owner (respondent) brought an action seeking an order for the appellant to demolish the house and claiming damages. The appellant's defence was that the tenant of the hut refused to quit and she took out a third party notice against the tenant. In his defence the tenant stated that he had verbally agreed

A to quit and deliver up possession of the hut if \$3,000 was paid to him as compensation. The owner paid the tenant and he vacated the house. The appellant then brought an action seeking payment of the \$5,400. The two actions were consolidated and the President of the Sessions Court allowed the respondent's claim ordering the appellant to pay liquidated damages of \$1 and to refund the \$600. He dismissed the appellant's claim against the tenant and the owner for the sum of \$5,400. On appeal the High Court affirmed the dismissal of the appellant's claim against the owner but allowed the appeal against the tenant ordering the tenant to indemnify the appellant the \$600 which she had to pay to the owner and costs. The appellant appealed.

Held: (1) the agreement in this case was nothing more than an accommodation or expression of goodwill by the owner of the land to the appellant, provided the agreement was performed in time. Time was of the essence of the contract;

C (2) in this case section 42 of the Contracts Act could not apply as (a) the performance was not done within the stipulated time as promised, (b) the appellant's plea that she was unable to perform because the tenant had refused to vacate the house cannot be accepted in view of her express undertaking under the agreement, (c) the performance by the tenant cannot be regarded as performance by the third person within the meaning of section 42 of the Act, as the tenant was in the same position as the appellant and (d) the owner by getting back the land did not get any benefit as what he got was rightly his own from the beginning;

D (3) the agreement clearly intended that the appellant would get the \$6,000 if she herself would demolish or deliver possession of the house by April 10, 1974 and section 41 of the Contracts Act was the appropriate section;

E (4) in this case the appellant had helped herself to substantial gains by arrogating to herself ownership of the land, paying no rent whatever and renting out the squatter house at \$80 a month for almost 20 years. In the circumstances, neither law nor equity could help her.

Case referred to:-

(1) *London v. Ryder* [1953] 2 Q.B. 202; [1953] 1 All E.R. 741.

FEDERAL COURT.

F *C. Das* for the appellant.

K.L. Chai for the respondent.

Cur. Adv. Vult.

Syed Othman F.J. (delivering the judgment of the Court): This appeal is against the decision of the High Court at Kuala Lumpur dismissing the appeal by the appellant against the decision of the Sessions Court dismissing her claim of \$5,400 under an agreement with the respondent (owner) a building developer and owner of a piece of land in Sentul, Kuala Lumpur, on which the appellant had built a house which was occupied by a tenant. On February 16, 1974 the parties entered into an agreement. In the recital, the main body of the agreement and in the appellant's **H** own pleading the house was described as a squatter house.

The substance of the agreement was that the owner paid her \$600 and she agreed to quit and deliver vacant possession of the house which she had the option either to demolish or of which to deliver vacant possession by April 10, 1974; in either event **I** the owner was to pay her a further sum of \$5,400 by way of compensation and travelling allowance; if the appellant failed to demolish or deliver vacant possession of the house on or before April 10, 1974 she agreed to pay the owner liquidated damages of \$200 per day for the breach.

The appellant did not fulfil her part of the bargain. In May 1974 the owner brought an action